

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

854
BRIEF FOR APPELLANTS

Q. Neg-2
10/19/67
(1)

IN THE
UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 20807

Haywood Liles

v.

United States of America

No. 20808

United States Court of Appeals
for the District of Columbia Circuit

John D. Johnson

FILED AUG 31 1967

v.

United States of America

Nathan J. Paulson
CLERK

Appeal from the United States District Court for the
District of Columbia

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Court-appointed counsel for
Appellants by the U. S. Court
of Appeals for the District of
Columbia Circuit
11th Floor - Fleming Building
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STATEMENT OF QUESTIONS PRESENTED

1. The question is whether Appellants were under arrest, or understood they were in the power of the one arresting, and submitted thereto in consequence, when they were stopped by two detectives of the Metropolitan Police Department, who had no warrants for Appellants' arrest; had no probable cause to believe that Appellants had committed a felony; had not observed the commission of a crime in their presence; and who asked Appellants to produce identification; questioned them as to their activities in the area; seized evidence, which was later admitted, over objection, at the trial; and told them to get in the back of a police cruiser to allegedly accompany the detectives to the scene of an admitted fight.

2. The question is whether the trial court erred in its instructions to the jury by failing to properly define the essential elements of the crime of robbery, in that the court omitted from its instructions the requirement that the Government must prove beyond a reasonable doubt that the defendants had the necessary specific criminal intent to deprive the victim of his property permanently.

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In The
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 20807

Haywood Liles, Appellant

v.

United States of America, Appellee

No. 20808

John D. Johnson, Appellant

v.

United States of America, Appellee

Appeal from the United States District Court for the
District of Columbia

APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

The Court has jurisdiction of this matter pursuant to
28 U.S.C. 1291. Appellants were charged with the crime of

robbery in violation of D.C. Code, Section 22-2901 (1961) by a grand jury on January 25, 1966, and were convicted of said charge after a trial by jury on February 9, 1967. On February 17, 1967, Appellants were sentenced to a term of from two to eight years and on the same date were authorized by the trial judge to proceed on appeal without prepayment of costs.

STATEMENT OF THE CASE

I. The Arrest

On December 4, 1965, at approximately 3:20 a.m., Appellants, Haywood Liles and John D. Johnson, were observed by Detectives Noone and Dollinger, of the Metropolitan Police Department Robbery Squad, running east on L Street, N. W. between 9th and 10th Streets, N. W., in the District of Columbia. (Motion Tr 5-6)

Detective Noone testified that Appellants, both of whom were wearing tan trench coats, ran between two buildings and into an alley, whereupon the detectives circled the block in their unmarked police cruiser and observed Appellants emerge from an alley in the 1100 block of 9th Street, N. W. without the trench coats. Appellants were approached by Detectives Noone and Dollinger, asked to produce identification

and questioned concerning their presence in the vicinity and as to what had happened to the trench coats. (Motion Tr 27) Appellants stated that they had been in a fight at 11th and L Streets, N. W., and Detective Noone requested Appellants to return to the scene of the fight. He further testified that both Appellants "agreed" to do so. (Motion Tr 7)

Detective Noone insisted that Appellants were not searched but stated that he saw and removed a knife protruding from Liles right rear pocket as he went to get in the back seat of the police car. (Motion Tr 12, 22) On the other hand, both Liles and Johnson maintain that they were searched by the detectives as they emerged from the alley sometime prior to their being told to get in the police cruiser. (Motion Tr 37-38, 44-45)

Detective Noone's testimony at the pretrial hearing on this important point as to the recovery of the knife is in direct contradiction with his later testimony at the hearing on the Motion to Suppress conducted during the trial. At the trial Detective Noone stated that Sergeant Dollinger recovered the knife from Liles at the time of the initial questioning as Appellants emerged from the alley (Tr 104-105, 116, 119, 147), whereas at the pretrial hearing he stated repeatedly that he personally removed the knife from Liles'

right rear pocket as Liles was "voluntarily" entering the police cruiser. (Motion Tr 13-14, 21-22, 28) Furthermore, Detective Noone would have the Court believe that Detective Dollinger first observed the knife during the questioning of Appellants but that he, Noone, did not remove the knife from Liles' pocket until after he started to enter the police cruiser. (Motion Tr 23) 1/

After Appellants were told to get into the rear seat of the police cruiser, and while allegedly enroute to 11th and L Streets, N. W., a radio call was received by the Detectives reporting a robbery at 11th and L Streets, N. W. (Motion Tr 7)

Upon reaching 11th and L Streets, N. W., the complaining witness, Harold C. Moody, approached the cruiser and stated that Appellants were the men who had beat and robbed him. (Motion Tr 7) After the complaining witness identified Appellants, they were asked to get out of the police cruiser and a wallet containing \$34.00, belonging to the complaining witness was found on the floor of the police cruiser.

1/ Detective Noone's testimony as to the events occurring at his initial confrontation with Appellants produces another glaring inconsistency as to who was driving the police cruiser. At the pretrial hearing he testified in three instances that Detective Dollinger was driving the police cruiser (Motion Tr 11, 21, 23) and at the hearing during trial he stated that he was driving. (Tr 101, 144, 152)

(Motion Tr 7) Detective Noone further testified that Appellants were not placed under arrest until they had been identified by the complaining witness at 11th and L Streets, N. W. (Motion Tr 32); that he had no warrant for the arrest of either Appellant; and had not observed Appellants committing a crime. (Tr 108)

Appellant Liles testified that at the time he and Johnson emerged from the alley the detectives stopped and searched each of them removing the knife from his right rear pocket (Motion Tr 38), and that he was under the impression he could not leave after he had been first stopped. (Motion Tr 39) He further testified that he stopped and submitted to interrogation and the search because these two men were policemen. (Motion Tr 42-43)

Appellant Johnson also testified at the pretrial hearing on the Motion to Suppress that he was searched by the detectives and he did not feel that he was free to leave after he had been initially stopped and searched by the detectives. (Motion Tr 44-45) 2/

2/ At the trial Johnson referred to his being searched by the detectives and clearly described his understanding that he was in the power of the arresting detectives in the following manner: (Tr 229-230)

"Q They [the detectives] what?

A Searched us down, wanted us to -- to take us back to where the fight started at.

Q And what did you say or what did you do?

A Nothing I could do but go along with them."

Judge Matthews denied Appellants' pretrial Motion to Suppress presumably holding that the arrest did not occur until after Appellants were identified by the complaining witness, stating that she did not believe Appellants' testimony that the police had searched them at their initial confrontation. (Motion Tr 54)

The trial judge denied Appellants Motion to Suppress during trial holding that the arrest occurred after the two defendants were identified by the victim of the robbery and at that time the police had probable cause to make the arrest. (Tr 139) 3/

II. The Alleged Robbery

The complaining witness, Harold C. Moody, testified that in the early morning hours of December 4, 1965, he and a companion were jumped from behind by two assailants and robbed. (Tr 43) The offense occurred in front of a servicemen's club near the corner of 11th and L Streets, N. W., in the District of Columbia. The complaining witness identified

3/ Counsel for Appellants at trial did not have the advantage of having a transcript of the testimony of Detective Noone at the pretrial hearing on the Motion to Suppress (Tr 97) Thus, the inconsistencies in his testimony at these two hearings were not brought out before the trial court.

both Appellants as his assailants. (Tr 48-49) He stated that the Appellant Liles, jumped him from behind; struggled with him; ripped his right rear pants pocket; and removed his wallet. (Tr 49-50)

The complaining witness stated that the Appellant Johnson first grabbed his companion before the companion was able to run into the servicemen's club to seek assistance. (Tr 51) He further stated that Johnson assisted Liles in pushing him into a fence and blocking his way into the club before both Liles and Johnson ran from the scene. (Tr 51, 91, 95)

The Appellant Liles admitted an altercation with the complaining witness. (Tr 166) He testified that after a brief altercation with Moody, he noticed several persons emerging from the servicemen's club and that as he reached to the ground to pick up his coat he saw a wallet that was laying beside his coat which he picked up because he thought it was his. (Tr 166-167) Liles denied removing the wallet from Moody's pants pocket (Tr 169), but admitted possession of the wallet and further admitted throwing the wallet on the floor of the police cruiser after he realized that it did not belong to him. (Tr 188-189)

The Appellant, Johnson, testified that he was present

with Liles in the early morning hours of December 4, 1965, at 11th and L Streets, N. W. when a fight started between Liles and Moody. (Tr 224-225) He testified that the fight lasted less than a minute before Moody's companion entered the servicemen's club and returned with others to aid Moody, at which time both he and Liles began to run. (Tr 225-226) Johnson denied that he had been fighting (Tr 229) and further denied any knowledge that Liles had possession of Moody's wallet. (Tr 231)

Appellants were indicted, tried and convicted by a jury of robbery in violation of D.C. Code, Section 22-2901 (1961) and both were sentenced to a term of imprisonment for a period of two to eight years on February 17, 1967.

STATUTES AND RULES INVOLVED

Constitution of the United States
Amendment IV--Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

D.C. Code, Section 22-2901 (1961)
Robbery

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

(March 3, 1901, 31 Stat. 1322, ch. 854, Sec. 810)

Rule 41(e) - Federal Rules of Criminal Procedure
(e) - Motion for Return of Property and to Suppress
Evidence

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, and (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be

restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT OF POINTS

1. Appellants were illegally arrested and the court erred in denying the motion to suppress the evidence which was seized from them at the time of their illegal arrest.

With respect to this point Appellants desire the Court to read the following pages of the reporter's transcript:

Motion Tr 1-55, inclusive
Trial Tr 99-140, inclusive

2. The judge's instructions to the jury were inadequate and require a reversal of these convictions for robbery in that the judge failed to instruct the jury on the essential element of specific criminal intent.

With respect to this point Appellants desire the Court to read the following pages of the reporter's transcript:

Trial Tr 408-424

SUMMARY OF ARGUMENT

I. THE ILLEGAL ARREST

Appellants were arrested for investigation by detectives of the Metropolitan Police Department who did not have warrants for Appellants' arrest; did not have probable cause to believe Appellants had committed a felony; and did not observe Appellants commit a crime in their presence. As a result of this illegal arrest certain evidence was seized from Appellants and in addition Appellants were identified by witnesses as having committed a robbery.

The court erred in denying Appellants' Motion to Suppress the evidence which was illegally seized from them and allowing said evidence and identification to be introduced at their trial on the robbery.

II. IMPROPER INSTRUCTIONS TO THE JURY

The trial judge failed to instruct the jury on every essential element of the crime of robbery. The court failed to state that the government was required to prove beyond a reasonable doubt that Appellants intended to steal the complaining witness' property and deprive him of it permanently. Although defendant's trial counsel failed to object to this omission, the court should notice this clear error affecting Appellants' substantial rights.

ARGUMENT

I. IMPROPER ADMISSION OF EVIDENCE OBTAINED AS A RESULT OF
AN UNLAWFUL ARREST

The time of arrest is the crucial question in this case. It is Appellants' contention that the arrest occurred when they were stopped, questioned and requested to get in the police cruiser and thus, the evidence obtained from them and the testimony concerning their identification by the complaining witness after their unlawful arrest should have been excluded at the trial.

There is no dispute that the arresting detectives did not have warrants for Appellants' arrest nor did they observe Appellants commit a crime. Furthermore, the government can not seriously contend that the detectives had probable cause to believe Appellants had committed a felony prior to their identification by the complaining witness.

The actions of the two detectives and Appellants' state of mind must be carefully analyzed to determine the time of the arrest. Both Appellants testified that they did not feel free to leave after they had been stopped by the detectives. In addition, they both testified, contrary to Detective Noone's testimony, that they were searched at the time they were stopped. Furthermore, there is no evidence that

the detectives informed Appellants that they were not under arrest or that they did not have to accompany them in the police cruiser.

The testimony of Detective Noone as to the important question whether a search occurred is difficult to believe, in view of the numerous inconsistencies in his testimony concerning the seizure of the knife from Appellant Liles. Also the facts in this case make it seem highly unlikely that these two veteran members of the Robbery Squad did not search Appellants. However, even viewing the testimony on the question of whether a search occurred most favorably to the government, Appellants maintain that the stopping, questioning, and placing these Appellants in the police cruiser amounted to an arrest as a matter of law.

In *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959), the Supreme Court in discussing the question of when the arrest occurred stated as follows:

"When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses, as *Johnson v. United States*, supra, holds." 361 U.S. 98, 103

In *Kelley v. United States*, 111 App.D.C. 396, 298 F.2d 310 (1961), this Court also had occasion to review the question of when an arrest had occurred. There, the defendant, while sitting in a crowded restaurant, was approached by a police officer and told to come outside, and although he had been committing no offense, he was asked to reveal the contents of his pockets. Kelley then produced a packet of marihuana cigarettes. The Court held that Kelley's motion to suppress the admission of the marihuana cigarettes should have been granted because he was under arrest when he answered an officer's call to come out of the restaurant. The Court in defining an arrest stated as follows:

"We recently had occasion to explore carefully the question of when an arrest is said to have occurred. *Coleman v. United States*, 111 U.S. App. D.C. ___, 295 F.2d 555, decided en banc September 8, 1961. We there found no error in an instruction which read:

'You are instructed that in order for there to be an arrest it is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest. *It is sufficient if the person arrested understands that he is in the power of the one arresting, and submits in consequence.*'" 298 F.2d 310, 312

Clearly, in the instant case the police restricted Appellants' liberty of movement and it is equally clear that

Appellants understood that they were in the power of and under the control of the police. Appellants would have indeed been rash to consider themselves free to refuse to accompany the detectives and simply walk away.

In commenting on the importance of considering a person's understanding or state of mind as to whether he was under arrest the court in *Seals v. United States*, 117 App.D.C. 79, 325 F.2d 1006 (1963) stated:

"In finding that Seals was not in fact under arrest before he confessed, the trial judge did not make it clear whether he considered whether or not Seals had reason to believe and did believe that he was under arrest. This was a very pertinent, if not determinative point, as the Coleman and Kelley cases, cited above, make clear." 325 F.2d 1006, 1008 (Footnote 5) (Emphasis supplied)

The detectives' course of conduct in this case is an example of a practice, namely an "arrest for investigation," which was condemned by this Court in *Gatlin v. United States*, 117 App.D.C. 123, 326 F.2d 666 (1963). Arrests for investigation have long been denounced by the courts and the prevention of such a practice has been considered a matter of vast public importance. In *Wrightson v. United States*, 95 App.D.C. 390, 222 F.2d 556 (1955), the court in condemning such arrests stated as follows:

"It is perfectly true that after the arrest Wrightson was identified by the victim of the robbery and confessions were presented and received. But the tendency of police officers to arrest people without warrants and without probable cause is a matter of vast public importance, and it has been of such importance since Colonial days. Courts cannot put a stamp of approval upon actions of the police when the officers, challenged by an accused, fail or refuse to demonstrate compliance with the rules which circumscribe their authority. Certainly the police have been warned enough in these respects, by the Supreme Court of the United States, by this court, and by many other courts." (Footnotes omitted.) 222 F.2d 556,558

The law is well settled that the validity of an arrest can not be proven by its fruits, *United States v. Di Re*, 332 U.S. 581, 68 S.Ct.222, 92 L.Ed. 210 (1948), and it is also well settled that evidence seized as a result of an illegal arrest is not admissible at trial. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct.1684, 6 L.Ed.2d 1081 (1961); *Williams v. United States*, 99 App.D.C. 161, 237 F.2d 789 (1956).

The same exclusionary rule applies to verbal evidence which derives from the illegal arrest. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The Supreme Court, in discussing the suppression of intangibles under a Motion to Suppress, stated as follows:

"The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of

an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. *McGinnis v. United States*, 1 Cir., 227 F.2d 598. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion. See *Nueslein v. District of Columbia*, 73 App.D.C.85, 115 F.2d 690." 371 U.S. 471, 485-486

Therefore, for foregoing reasons it is respectfully submitted that the trial court was in error in denying Appellants' Motion to Suppress Evidence.

II. FAILURE OF THE TRIAL COURT TO PROPERLY INSTRUCT

JURY AS TO THE ESSENTIAL ELEMENTS OF ROBBERY

The law is well settled in this jurisdiction that the trial judge's failure to instruct the jury on the essential element of specific intent to steal in a robbery case is reversible error. In fact this Court has recently held that such a failure amounts to "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure. *Jackson v. United States*, 121 App.D.C. 160, 348 F.2d 772 (1965); *Byrd v. United States*, 119 App.D.C. 360, 342 F.2d 939 (1965).

The trial court in the instant case, after reading the indictment to the jury and paraphrasing D.C. Code Section 22-2901 (1961) concluded its instructions on the essential elements of the crime of robbery as follows:

"In this case the burden of proof is on the Government to prove that on December 4, 1965, these defendants, by force and violence and by putting in fear and against resistance, stole and took from the person and from the immediate actual possession of Harold C. Moody, property of Harold C. Moody of the value of \$35.

"In order to find the defendants guilty, you must find, among other elements, that there was taking by force and violence or by stealth from the person or immediate actual possession of the complainant Moody." (Tr 417) (Emphasis supplied.)

The trial court went on to instruct the jury on the principle of aiding and abetting in regard to Appellant Johnson and in that instruction the court referred again to the "other elements" of the crime of robbery but nowhere in its instructions does it define these "other elements." The court's omission was not objected to below.

Appellants request the Court to take notice of this error pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure in that it is an error clearly affecting substantial rights of these Appellants.

The question of the trial court's failure to properly define the essential elements of the crime of robbery was

recently discussed by this Court in *Byrd*, supra, where the Court held:

"Since there are essential elements of common law robbery not stated in the statute, such as the specific intent to steal, mere reading of the statute was plainly inadequate. It was fundamental error to send the case to the jury without instructions as to the elements of the offense which the Government must prove beyond a reasonable doubt before a verdict of guilty can be returned." 342 F.2d 940-941

In noticing this error, even though objection was not raised at trial the Court further stated as follows:

"We hold, therefore, that the trial judge's omission to instruct the jury on every essential element of the crime was plain error under Rule 52(b), Fed.R.Crim.P. By this omission, appellant's substantial right to have the jury pass on every essential element of the crime was prejudicially affected and a new trial is required." 342 F.2d 939, 942

The ruling in *Byrd*, was followed in *Jackson*, supra, where this Court again invoked the application of Rule 52(b) reversing the defendant's robbery conviction for the trial judge's failure to instruct the jury on the essential element of specific intent. In so ruling the Court stated as follows:

"This instruction was clearly erroneous since commission of the crime of robbery requires the specific intent to deprive the victim of her property, not merely the general intent to take something 'on purpose.' *Morrisette v. United States* 342 U.S. 246, 72 S.Ct.240, 96 L.Ed.223 (1952);

Mills v. United States, 97 U.S.App.D.C. 131, 228 F.2d 645 (1955); *United States v. Kemble*, 3 Cir., 197 F.2d 316 (1952). Although no objection was made, it is clear that the charge left the jury misinformed on an essential element of the crime." 348 F.2d 772,773.

The same result was reached by the 10th Circuit in *Findley v. United States*, 362 F.2d 921 (1966), where that Court invoked the "plain error" rule reversing Findley's conviction for selling stolen government property for the trial court's failure to properly instruct the jury on the government's burden to prove beyond a reasonable doubt that defendant had the requisite criminal intent.

The failure of the trial court in the instant case to instruct the jury on specific intent is clearly erroneous, particularly where Appellants' defense was based solely on the premise that they did not intend to commit the offense charged. Appellant Liles admitted having possession of the complainant's wallet and further admitted throwing it on the floor of the police cruiser but steadfastly maintained that he never intended to steal the wallet.

CONCLUSION

Therefore, for the foregoing reasons, Appellants respectfully request the Court to reverse the verdict of the Court below, and remand the case for a new trial, with

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instructions to exclude evidence as to Appellants' identification by the complainant; and exclude any use of the wallet and its contents, the knife, and the Appellants' coats.

Respectfully submitted,

Thomas D. Quinn, Jr.

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P-1025-2
10/19/67
(1)

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,807

HAYWOOD LILES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,808

JOHN D. JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals

for the District of Columbia Circuit

FILED OCT 5 1967

Nathan J. Paulson
CLERK

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Cr. No. 102-66

QUESTION PRESENTED

In the opinion of appellee the following question is presented:

Whether the District Court properly found that the robbery victim's wallet was seized pursuant to a lawful arrest.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,807

HAYWOOD LILES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,808

JOHN D. JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. Summary of Proceedings

In January, 1966 appellants were indicted for the crime of robbery. On March 25, 1966, appellants' motion to

suppress was heard and denied by Judge Matthews.¹ Appellants were tried before a jury, found guilty of robbery and on February 17, 1967, were sentenced by Judge McGarraghy to a term of two to eight years.

B. The Robbery

Appellants were charged with stealing a wallet containing \$34.00 from Harold C. Moody on or about December 4, 1965. Moody, who at the time of the offense was a corporal in the United States Marine Corps, testified that on December 4, 1965, he was staying with a fellow marine, Michael Nelson, at the Sailors', Marines', Airmens' Club located in the District of Columbia at K and 11th Streets, Northwest (Tr. 43). In the early morning hours of December 4, 1965, at approximately 3.00 a.m., he and Nelson were returning to the club walking up L Street toward the L Street entrance of the club. Having turned into L Street from 11th Street, they saw Liles and Johnson crossing 11th Street at L Street. (Tr. 44-47). As the two groups passed within a few feet of each other at the corner of 11th and L Streets, either Liles or Johnson asked the marines, "where are you going?" (Tr. 46-47). The marines apparently did not answer but proceeded up L Street walking away from 11th Street (Tr. 70). Moody testified that as he and Nelson proceeded up L Street, they were jumped from the rear; Liles jumping him and Johnson jumping Nelson, with either Liles or Johnson saying "something in the nature of don't do anything, you won't get hurt, give us all your money." (Tr. 47-48, 87). Nelson immediately broke Johnson's hold and ran into the club. Liles in the meantime pulled Moody's sweater over Moody's shoulders immobilizing his arms. With Johnson aiding him, Liles beat Moody ripping his clothing² and

¹ Appellants renewed their motion to suppress at trial before Judge McGarraghy who dismissed the jury, heard testimony and denied the motion.

² Moody testified that his pants were ripped from the right, rear pocket, where he kept his wallet, down through the leg. The rip

taking his wallet, which contained \$34.00 in cash, from his trousers' pocket (Tr. 49-50, 53). Within a few minutes Nelson emerged from the club carrying an aluminum coat rack (Tr. 49-50, 77, 93). Seeing Nelson, Liles and Johnson stopped beating Moody and ran, heading east on L Street (Tr. 49, 75, 94).

Liles and Johnson testified in their own behalf. According to Liles, Moody and Nelson bumped into him and Johnson at the corner of L and 11th Streets. There followed an exchange of words between the two groups and a fight. (Tr. 166). Liles testified that when someone yelled for the police and three men emerged from the club, he picked up a wallet from the ground which he thought was his and ran (Tr. 166-167).

Johnson testified, as did Liles, that a fight between the marines and Liles and himself began after an exchange of words at the corner of 11th and L Streets. He stated that, when Nelson ran into the club and emerged a few minutes later with help, he and Liles ran (Tr. 225-226).

C. The Arrest

In the early morning hours of December 4, 1965, Detectives Noone and Dollinger of the Metropolitan Police Force, Robbery Squad, were cruising in an unmarked police car in the area of 10th and L Streets, Northwest (M.S.³ 5-6; Tr. 100). At about 3:20 a.m. Detective Noone observed Liles and Johnson wearing trench coats and running rapidly in an easterly direction on L, then north on 10th Street, where he saw Liles and Johnson run off the sidewalk through a yard into an alley between two buildings (M.S. 5-6; Tr. 102, 111-112, 130, 142). The detectives circled the block in their cruiser and saw Johnson and Liles, who had removed and thrown away their

was a straight sheer and appeared to Moody as if it had been done with a knife. (Tr. 54, 73-74, 76).

³ M.S. refers to the transcript of the hearing on the motion to suppress.

trench coats, coming out of the alley (M.S. 5-6, 10; Tr. 102, 113, 142). The detectives parked their vehicle at the mouth of the alley, got out of the car and approached Liles and Johnson (Tr. 103). They identified themselves as policemen, asked Liles and Johnson for identification and the reason why they were running and had thrown their coats away in the alley (M.S. 6, 26-27, 30; Tr. 103, 121, 143, 229). Liles and Johnson explained that they had been in a fight "with some white fellows" at 11th and L Streets and "did not want to get into any trouble." (M.S. 7; Tr. 103-104, 125, 127, 14, 229). After Liles denied even having a coat (M.S. 38, 41-42), Detective Noone suggested that they return to 11th and L to "get this straightened out." Liles and Johnson agreed (M.S. 7, 10-12; Tr. 105-106, 117, 143). Before Liles and Johnson got into the police cruiser, one of the detectives saw a knife protruding out of Liles' right, rear trousers pocket and removed it (M.S. 7, 12-13; Tr. 104, 116, 147).⁴ Liles and Johnson then got into the back seat of the cruiser which was a four door vehicle with the rear doors capable of being opened from the inside (M.S. 9; Tr. 120).

While enroute to 11th and L Streets, the detectives received a "lookout" that a robbery had just occurred at 11th and L Streets (M.S. 7; Tr. 106-107). Upon arriving at 11th and L, Detective Noone got out of the cruiser, spotted the robbery victim, Harold Moody, and identified himself. Moody, walked over to the cruiser and, looking inside, identified Liles and Johnson as the two men who "beat and robbed" him (M.S. 7, 20). The detectives then told Liles and Johnson that they were under arrest (M.S. 8).

⁴ It is not clear if Detective Noone or Detective Dollinger removed the knife. At the motion to suppress, Detective Noone testified that Dollinger saw the knife first but that he (Noone) removed it (M.S. 7, 12-13, 28). At trial, nearly a year later, Noone testified that Dollinger removed the knife (Tr. 104, 116, 147).

Appellants disputed this part of Detective Noone's testimony contending that the knife was discovered and removed when the detectives patted them down (M.S. 37-38, 44-45).

As they were awaiting a police wagon to transport appellants to the precinct, Detective Noone found Moody's wallet, which contained \$34.00, in the back of the cruiser on the floor where Liles had put it (M.S. 7-8, 23; Tr. 145-146, 188).

Appellants argued below and contend here that Moody's wallet was seized pursuant to an unlawful arrest.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

SUMMARY OF ARGUMENT

Appellants argue that the District Court erred in denying their motion to suppress as evidence Moody's wallet found on the floor of the cruiser where Liles had put it. They contend that they were arrested when, emerging from the alley on 10th Street, they were met by Detectives Noone and Dollinger, a time when, so they argue, the Detectives lacked probable cause. There is, however, nothing ipso facto unconstitutional in the police briefly detaining citizens on the street under circumstances not justifying an arrest for the purpose of a limited inquiry to explain suspicious conduct. *Dorsey v. United States*, — U.S. App. D.C. —, 372 F.2d 928 (1967); *Green v. United States*, 104 U.S. App. D.C. 23, 259 F.2d 180 (1953), *cert. denied*, 359 U.S. 917 (1959). Under the circumstances here, we believe there was an ample basis for the detectives to investigate appellants' suspicious conduct. *Dorsey v. United States*, *supra*; *Bell v. United*

States, 102 U.S. App. D.C. 383, 254 F.2d 82, *cert. denied*, 358 U.S. 885 (1958); *Cotton v. United States*, 371 F.2d 385, 391-92 (9th Cir. 1967). Indeed, "any other course would have shown poor judgment and a callousness towards proper police action." *United States v. Lewis*, 362 F.2d 759, 761 (2d Cir. 1966). To argue, as appellant does, that this initial confrontation amounted to an arrest ignores the realities of the situation. If none of the parties understood that an arrest had taken place at this point—which, we submit, was the case here—the law will not find the contrary. See *Seals v. United States*, 117 U.S. App. D.C. 79, 325 F.2d 1006 (1963), *cert. denied*, 376 U.S. 964 (1964).

Having briefly detained appellants and having made a reasonable inquiry, the Detectives acquired information giving them probable cause to believe appellants had committed a crime. What followed thereafter was a reasonable investigation leading to appellants identification as the robbers and their formal arrest. We find nothing unreasonable or unlawful in the manner in which appellants were arrested and the victim's wallet seized.

ARGUMENT

The District Court properly found that the victim's wallet was seized pursuant to a lawful arrest and hence was admissible as evidence.

(M.S. 5-6, 7, 8, 9, 10, 12, 13, 20, 23, 26-27, 30, 38, 41-42; Tr. 100, 102, 103, 104, 105, 106, 107, 111-12, 113, 116, 117, 121, 125, 127, 130, 142, 143, 145-46, 147, 188, 229)

Appellants argue that Moody's wallet found on the floor of the cruiser where Liles had put it should have been excluded as evidence.⁵ Appellants contend that they

⁵ We believe appellants' contention that the absence of an instruction on the element of specific intent is plain error is well taken. The only element in dispute below was the element of specific intent, Liles contending that he took Moody's wallet thinking it

were arrested when, emerging from the alley on 10th Street, they were met by Detectives Noone and Dollinger and asked to explain their conduct. Their argument is premised on the supposition that the detectives lacked probable cause to arrest them at this time.

While we think the detectives had probable cause to arrest appellants when they emerged from the alley, we do not press the point because we think it is clear that the arrest took place in contemplation of law at a time subsequent to this confrontation. We, therefore, assume for purposes of this argument that the detectives lacked probable cause to make an arrest when appellants emerged from the alley.

We take it that there is nothing ipso facto unconstitutional in the police briefly detaining citizens on the street under circumstances not justifying an arrest for the purpose of a limited inquiry to explain suspicious conduct. *Dorsey v. United States*, — U.S. App. D.C. —, 372 F.2d 928 (1967); *Brown v. United States*, — U.S. App. D.C. —, 365 F.2d 976, 979 n. 4 (1966); *Green v. United States*, 104 U.S. App. D.C. 23, 259 F.2d 180 (1953), *cert. denied*, 359 U.S. 917 (1959); *Dixon v. United States*, 111 U.S. App. D.C. 305, 296 F.2d 427 (1961); *Cotton v. United States*, 371 F.2d 385, 391-92 (9th Cir. 1967); *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966); *Busby v. United States*, 296 F.2d 328, 331 (9th Cir. 1961), *cert. denied*, 369 U.S. 876 (1962); *United States v. Lewis*, 362 F.2d 759 (2d Cir. 1966); *United States v. Thomas*, 250 F. Supp. 771, 779-85 (S.D. N.Y. 1966); *United States v. Bonanno*, 180 F. Supp. 71,

was his own (Tr. 166-167). Under such circumstances, we believe *Jackson v. United States*, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965) (majority and dissenting opinions) requires that this case be remanded to the District Court for a new trial. However, because the question involving the admissibility of Moody's wallet will be an issue at the second trial if not disposed of here, in the interest of judicial expediency we urge the Court to review the District Court's ruling denying appellants' motion to suppress before remanding this case for a new trial.

78 (S.D.N.Y.), *rev'd on other grounds sub nom.; United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960); *People v. Rivera*, 14 N.Y.2d 441, 201 N.E. 32 (1964), *cert. denied*, 379 U.S. 978 (1965). Such authority was recognized at common law and, as the New York Court of Appeals recently noted, "is extensively treated both by statute and by judicial decision as a reasonable and necessary police authority for the prevention of crime and the preservation of public order." See *People v. Rivera*, 14 N.Y.2d at 445-46, 201 N.E.2d at 35 and the authorities cited therein. Indeed, it was recognized and unquestioned by the Supreme Court in *Rios v. United States*, 364 U.S. 253, 261-62 (1960). As Judge Kaufman said in *United States v. Bonanno*, *supra* at 78: "[E]very temporal restriction of absolute freedom of movement is not an illegal police action demanding suppression of all resultant evidence * * *. If that were the case, police investigation would be dealt a crippling blow, by imposing a radical sanction unnecessary for the protection of a free citizenry." Thus, we start with the proposition that, because the need for effective and efficient law enforcement far outweighs the slight inconvenience to the individual and the rather minor invasion of the individual's privacy, the authority for the police to detain citizens briefly for the limited purpose of explaining suspicious conduct is well established.⁶

⁶ *Kelley v. United States*, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961) is not to the contrary. There the defendant was convicted of being a transferee of non-taxpaid marihuana. At about 2:00 a.m. one morning, he was seen by officers seated at a lunch counter. The officers approached him, identified themselves and told him to come outside, that they wished to talk with him. Outside the restaurant the officers asked him what he had in his pockets. He replied "marihuana cigarettes." The officers commanded him to take the marihuana out of his pocket, which he did, and then "placed" him under arrest. The Court held that since the seizing of the marihuana cigarettes was not pursuant to a lawful arrest, the cigarettes should not have been admitted in evidence. While there is language in the Court's opinion which might support the thesis that an arrest occurred when the officers approached Kelley and asked him to step outside the restaurant, we think the case

We do not suggest that all pre-arrest detentions by the police are lawful. Those calculated to harrass with no legitimate end in view are not to be sanctioned. See *United States v. Bonanno*, *supra* at 80. But where there is a "founded suspicion . . . , some basis from which the court can determine that the detention was not arbitrary or harrassing," the detention will ordinarily be upheld. *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966); see *Dorsey v. United States*, — U.S. App. D.C. —, 372 F.2d 928 (1967). We recognize that a "founded suspicion" may be an elastic concept; that the permissive degree to which an officer may detain a citizen on grounds short of probable cause may be a function of the circumstances which led to the detention. See *United States v. Thomas*, *supra* at 789-790. Circumstances which might support a brief on the street detention for the purpose of a limited inquiry might not suffice when the detention goes beyond that which can be characterized as brief and expands in scope but fall short of arrest. The test, it seems to us, is one of reasonableness. *Dorsey v. United States*, *supra* at 930.

Here, Detectives Noone⁷ and Dollinger of the Robbery Squad, as they were cruising in an unmarked police car, saw appellants at 3:20 in the morning wearing trench coats and running at a rapid pace in an easterly direc-

turned on a more fundamental point. The officers in *Kelley* had absolutely no basis to detain the defendant even for a limited inquiry, for the defendant was in no way acting suspiciously. Furthermore, it is clear that at the time they searched Kelley—that is, asked him what he had in his pockets—they lacked information sufficient to constitute probable cause. The fact is that Kelley was never arrested prior to the search but simply detained, questioned, and searched without any legitimate reason. For this reason and because cases such as *Dorsey*, *(Melvin) Brown* and *Green* support such a conclusion, we do not read *Kelley* as outlawing all pre-arrest detentions.

⁷ We note that Detective Noone, at the time of appellants' arrest, had served on the Robbery Squad for six years and had been with the Metropolitan Police Force for 16 years (Tr. 100). He thus was an experienced officer.

tion on L Street, Northwest, near 10th Street. The detectives observed appellants run off the sidewalk through a yard and into an alley between two buildings. (M.S. 5-6; Tr. 102, 111-112, 130, 142). After circling the block in their cruiser, they saw appellants, who had removed and thrown away their trench coats, come out of the alley (M.S. 5-6, 10; Tr. 102, 113, 142). Obviously, appellants were in the process of flight. To be sure, the officers did not know what they were fleeing from but the absence of such knowledge did not render their investigation unreasonable. *Bell v. United States*, 102 U.S. App. D.C. 383, 254 F.2d 82, *cert. denied*, 358 U.S. 885 (1958). It was 3:20 in the morning and it was apparent that appellants were, in addition to fleeing, seeking to cover their identity; else why run into an alley, remove and leave behind two perfectly good trench coats? These circumstances were more than sufficient to support a brief on the street detention. See *Dorsey v. United States*, *supra*; *Green v. United States*, *supra*; *Dixon v. United States*, 111 U.S. App. D.C. 305, 296 F.2d 427 (1961); *Bell v. United States*, 102 U.S. App. D.C. 383, 254 F.2d 82, *cert. denied*, 358 U.S. 885 (1958); *Ellis v. United States*, 105 U.S. App. D.C. 86, 264 F.2d 372, *cert. denied*, 356 U.S. 674 (1959); *Cotton v. United States*, 371 F.2d 385, 391-92 (9th Cir. 1967); see also *Keiningham v. United States*, 113 U.S. App. D.C. 295, 307 F.2d 632 (1962), *cert. denied*, 371 U.S. 948 (1963); *United States v. Lewis*, 362 F.2d 759 (2d Cir. 1966); *United States v. Thomas*, 250 F. Supp. 771 (S.D.N.Y. 1966). Indeed, we think they compelled the detectives to investigate through a reasonable inquiry. As the Court of Appeals for the Second Circuit recently noted in a case involving circumstances analogous to those here: "any other course would have shown poor judgment and a callousness towards proper police action." *United States v. Lewis*, 362 F.2d at 761.

To argue, as appellants do, that the detectives, in briefly detaining them for the purpose of explaining their highly suspicious conduct, actually arrested them is to

oversimplify the analysis and to ignore the realities of the situation. To be sure, there are some situations in which the briefest detention might constitute an arrest; that is there are some detentions that can only be viewed as the taking of a citizen into police custody to answer for a crime, and are so understood by the participants and lay observers. See *Coleman v. United States*, 111 U.S. App. D.C. 210, 295 F.2d 555 (1961), *cert. denied*, 369 U.S. 813 (1962); *Henry v. United States*, 361 U.S. 98 (1959). But this does not mean that all detentions, however brief and limited in scope, are arrests in the constitutional sense. We agree with Judge Kaufman's observations in *United States v. Bonanno*, *supra* at 77:

One must never forget that this is a decision on the rights of individuals and the duties of government, and not an abstract exercise in definition. In dealing with words there is always a temptation to allow them to be separated from their objective correlatives in the everyday world, and to treat them as if they have, or ought to have, one single meaning, unaffected by the contexts in which they occur and divorced from the world of things and events which give them their content and justification.

"Arrest" is just such a word, not only because it is necessarily unspecific and descriptive of complex, often extended processes, but because in different contexts it describes different processes, each of which has built up, in both legal and common parlance, sharply divergent emotional connotations.

Assuming for the moment, however, that this case turns on a definition of arrest, we do not think it can be said that Detectives Noone and Dollinger arrested appellants when they initially confronted them. The detectives parked their vehicle at the mouth of the alley, got out of their car and approached appellants (Tr. 103). They identified themselves as policemen, asked appellants for identification and the reason why they were running and had thrown their coats away in the alley (M.S. 6, 26-27, 30; Tr. 103, 121, 143, 229). If "arrest" means taking

a person into custody to answer for a crime⁸—which we think is the way a layman views “arrest”⁹—the detectives initial confrontation with appellants could hardly be termed an “arrest.” If neither party understood that an arrest had taken place at this point—which we submit was the case here—the law will not ordinarily find the contrary. See *Seals v. United States*, 117 U.S. App. D.C. 79, 325 F.2d 1006 (1963), *cert. denied*, 376 U.S. 964 (1964).

But putting aside the formulation of a definition of arrest, we believe that Detectives Noone and Dollinger were legally justified in briefly detaining appellants and making a reasonable inquiry because the interests to be served by allowing such police conduct under the circumstances here far outweigh the slight inconvenience and minimal intrusion into privacy resulting to appellants in having to stop and explain their conduct.

Having briefly detained appellants and having made a reasonable inquiry, the detectives, if they lacked probable cause initially, were not prohibited from acquiring information giving them probable cause. *Dorsey v. United States*, *supra*; *Keiningham v. United States*, *supra*; *Bell v. United States*, *supra*; *Cotton v. United States*, 371 F. 2d 385 (9th Cir. 1967); *Busby v. United States*, 296 F. 2d 328 (9th Cir. 1961), *cert. denied*, 369 U.S. 876 (1962); *United States v. Lewis*, 362 F.2d 759 (2d Cir. 1966).

In answer to the detectives' inquiry as to why they were running, appellants explained that they had been in a fight “with some white fellows” at 11th and L Streets

⁸ See *United States v. Bonanno*, *supra* at 78.

⁹ We think it is significant that a lay observer would not understand the initial confrontation between the detectives and appellants to be an arrest, for we believe that the citizen is not only entitled to be protected from the unwarranted inconvenience and restraint on his liberty resulting from being taken to the station-house but that he is also entitled to be protected from the social stigma and embarrassment that may arise as a result of having others believe he was arrested.

and "did not want to get into any trouble." (M.S. 7; Tr. 103-104, 125, 127, 143, 229). And when asked why they threw their coats in the alley, Liles denied ever having a coat (M.S. 38, 41-42). We think it is beyond debate that these answers combined with the circumstances under which appellants were stopped gave the detectives probable cause to believe that appellants had committed an assault of some kind.¹⁰ See 22 D.C. Code §§ 501-507. It was at this point that Detective Noone suggested that they return to the scene to "get this straightened out," a suggestion to which appellants agreed¹¹ (M.S. 7, 10-12; Tr. 105-106, 117). What followed thereafter was a reasonable investigation ultimately leading to appellants' formal arrest. With appellants in the back seat of the cruiser, the detectives drove back to 11th and L Streets. Enroute they received a "lookout" that a robbery had just occurred at 11th and L Streets (M.S. 7-9; Tr. 106-107). Upon arriving at 11th and L, Detective Noone got out of the cruiser, approached the robbery victim, Harold Moody, and identified himself as

¹⁰ The police officers did not have to know of the robbery to have probable cause to believe appellants committed a felony. *Dixon v. United States*, 111 U.S. App. D.C. 305, 296 F.2d 427 (1961); *Robinson v. United States*, 109 U.S. App. D.C. 22, 283 F.2d 508 (1960), *cert. denied*, 365 U.S. 830 (1961); *Bell v. United States*, 102 U.S. App. D.C. 383, 254 F.2d 82, *cert. denied*, 358 U.S. 885 (1958). Nor in assessing probable cause is the Court bound by the arresting officers' rationale or justification for his action. "The question is not what name the officer attached to his action; it is whether, in the situation in which he found himself, he had reasonable ground to believe a felony had been committed and that the men . . . [arrested] had committed it." *Bell v. United States*, *supra* at 387.

¹¹ Before getting into the cruiser one of the detectives saw a knife protruding out of Liles' right, rear trousers pocket and removed it (M.S. 7, 12-13, 22; Tr. 104, 116, 147). This seizure did not entail a search. The visual observation of a weapon unlawfully in the possession of its carrier (see 22 D.C. Code §§ 3204, 3214) does not constitute a search. See *Hiet v. United States*, — U.S. App. D.C. —, 372 F.2d 911 (1967); *Ellison v. United States*, 93 U.S. App. D.C. 1, 3, 206 F.2d 476, 478 (1953). Furthermore, we think the discovery of this knife added to the circumstances supporting the detectives' reasonable belief that appellants had committed a crime.

a police officer. Moody walked over to the cruiser and, looking inside, identified appellants as the men who "beat and robbed" him (M.S. 7, 20).¹² The detectives then told appellants that they were under arrest and subsequently, as they were awaiting a police wagon to transport appellants, discovered Moody's wallet in the back of the cruiser on the floor where Liles had put it (M.S. 7-8, 23; Tr. 145-146, 188).

We find nothing unreasonable or unlawful in the manner in which appellants were arrested and the victim's wallet seized. Accordingly, we submit that the ruling of the District Court admitting Moody's wallet in evidence is unassailable.

CONCLUSION

WHEREFORE, it is respectfully submitted that the ruling of the District Court denying appellant's motion to suppress be affirmed and that the judgment of conviction be reversed and the case be remanded to the District Court for a new trial.

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¹² Of course, it was perfectly proper to take appellants back to the scene of the robbery for the purpose of identification after the detectives received the robbery "lookout." See *Wise v. United States*, D.C. Cir. No. 20,259, decided July 27, 1967.

